No. 17-1011

In the Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AFRICAN UNION, FOOD AND AGRICULTURE ORGANIZATION, AND GREAT LAKES FISHERY COMMISSION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are twelve international organizations that operate around the world to provide medical treatment, combat hunger, conserve valuable natural resources, promote democracy, assist impoverished rural populations, secure financial stability, promote global innovation, and recommend policies aimed at promoting sustainable economic growth and improving the social well-being of countries and their citizens, among other missions to serve the public good across national boundaries. *Amici* submit this brief to highlight the broad and significant repercussions that limiting the immunities enjoyed by them and many other international organizations designated under the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 *et seq.*, would have on their ability to perform their vital tasks.

The missions of the *amici* cover a diverse range of subjects:

The African Union is a continental organization aimed at accelerating the process of

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented in writing to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* hereby state that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

integration on the African continent and addressing multi-faceted social, econor and political issues. It aims, among other things, to promote sustainable development, promote research in all fields but particularly in the areas of science and technology, work to eradicate preventable diseases, and promote good health on the continent. It was designated by President George W. Bush as an international organization under the IOIA in 2005. Exec. Order No. 13,377, 70 Fed. Reg. 20,263 (Apr. 13, 2005).

The Food and Agriculture Organization ("FAO") is a specialized agency of the United Nations that leads international efforts to defeat hunger. FAO collects, analyzes, and disseminates data that aids in development, and assists member countries in devising agricultural policy, drafting effective legislation, and supporting projects aimed at achieving rural development and hunger alleviation goals. It was designated by President Harry S. Truman as an international organization under the IOIA in 1946. Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946).

The Great Lakes Fishery Commission ("GLFC") facilitates cooperation between the United States and Canada to protect and sustain the Great Lakes fishery. It promotes scientific research, controls the invasive sea lamprey, and facilitates cooperative fishery management among various state and federal agencies. It was designated by President John F. Kennedy as an international organization under the IOIA in 1962.

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962).

The International Fund for Agricultural Development ("IFAD") is a specialized agency of the United Nations aimed at inclusive and sustainable rural transformation to assist poor rural people in overcoming poverty and achieving food security through remunerative, sustainable, and resilient livelihoods. It is tasked with the mandate to eradicate poverty and hunger by investing in impoverished rural individuals through financial and technical assistance to agriculture and rural development projects in developing member states. It was designated by President George H.W. Bush as an international organization under the IOIA in 1990. Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990).

The International Monetary Fund ("IMF") works to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. It was designed by President Harry S. Truman as an international organization under the IOIA in 1946. Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946).

The International Pacific Halibut Commission facilitates cooperation between the United States and Canada to protect and manage the stocks of Pacific halibut fish. It promotes research, devises conservation policies, and operates fisheries to maintain adequate Pacific

halibut stocks and ensure the healthy development of a vital fish species. It was designated by President John F. Kennedy as an international organization under the IOIA in 1962. Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962).

The North Pacific Marine Science Organization ("PICES") promotes and coordinates marine scientific research in order to advance scientific knowledge of the North Pacific Ocean and of its living resources, including research with respect to the ocean environment and its interactions with land and atmosphere, its role in and response to global weather and climate change, its flora, fauna and ecosystems, its uses and resources, and impacts from human activities. It was designated by President William J. Clinton as an international organization under the IOIA in 1994. Exec. Order No. 12,894, 59 Fed. Reg. 4237 (Jan. 26, 1994).

The Organisation for Economic Cooperation and Development ("OECD") is an intergovernmental organization aimed at stimulating sustainable economic development. The OECD engages in the promotion of the highest sustainable economic growth, financial stability, and the improvement of the social well-being and the standard of living, assisting governments by providing evidence-based analysis. It was designated by President Harry S. Truman as an international organization under the IOIA in 1950.

Exec. Order No. 10,133, 15 Fed. Reg. 4159 (June 27, 1950).[2]

The Pacific Salmon Commission ("PSC") is an international decision-making organization, composed of four Commissioners (and four alternates) from the United States and Canada. The PSC manages—through research and regular meetings between national, provincial/state, First Nation, and U.S. tribal delegates—commercial, sport, and subsistence salmon fisheries in the United States and Canada. It is responsible for all salmon originating in the waters of one country which are subject to interception by the other, or which impact management of the other country's salmon, or which biologically affect the stocks of the other country. It was designated by President Ronald Reagan as an international organization under the IOIA in 1986. Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986).

The United Nations Industrial Development Organization ("UNIDO") is a specialized agency of the United Nations tasked with furthering industrial development in developing countries and countries with economies in transition. UNIDO fulfills its mandate by designing and implementing projects in beneficiary countries, which includes offering technical services and mobilizing financial services to fund environmentally-conscious development projects, and providing analytical

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[2] Exec. Order No. 10,133 designated the Organisation for European Economic Cooperation, which ultimately became the OECD, as an international organization under the IOIA.

research and policy advisory services. It was designated by President Ronald Reagan as an international organization under the IOIA. Exec. Order No. 12,628, 53 Fed. Reg. 7725 (Mar. 8, 1988).

The World Health Organization ("WHO") is a specialized agency of the United Nations, composed of 194 Member States (including the United States of America). Its objective is the "attainment by all peoples of the highest possible level of health" Constitution of the World Health Organization (hereinafter "WHO Constitution") art. 1, July 22, 1946 (as amended Sept. 15, 2005), 14 U.N.T.S. 185. Since its establishment in 1946, WHO has acted as the directing and coordinating authority on international health work by, *inter alia*, working with countries and a wide range partners to prepare for, prevent, respond to, and recover from all hazards that create disease outbreaks, in particular through its "Health Emergencies Programme"; providing leadership on matters critical to health; promoting research on health; setting norms and standards; articulating ethical and evidence-based policy options; providing technical public health support to countries; and monitoring and assessing health trends. The United States of America decided to become a member of the WHO through a Congressional Joint Resolution approved on June 14, 1948. *See* Joint Resolution, Ch. 469, 62 Stat. 441 (1948). Accordingly, the United States of America deposited its instrument of acceptance with the UN Secretary-General on 21 June 1948. All States Parties to the WHO Constitution, including therefore the United States of America, have

agreed to the legally-binding requirement that the Organization "shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions." WHO Constitution art. 67(a). It was designated by President Harry S. Truman as an international organization under the IOIA in 1948. Exec. Order No. 10,025, 13 Fed. Reg. 9361 (Dec. 30, 1948).

The World Intellectual Property Organization ("WIPO") is a specialized agency of the United Nations that was established as a global forum for intellectual property services, policy, information, and cooperation. It administers international registration systems in the field of patent trademarks, industrial designs, and appellations of origins, provides policy recommendations for shaping international intellectual property rules, a dispute resolution mechanism for resolving intellectual property-related disagreements across borders, and technical infrastructure services and support. It was designated by President Gerald R. Ford as an international organization under the IOIA in 1975. Exec. Order No. 11,866, 40 Fed. Reg. 26,015 (June 18, 1975).

SUMMARY OF ARGUMENT

The IOIA was enacted in 1945, at the dawn of the post-World War II era in which the United States took the lead in helping to promote international economic and political cooperation, to rebuild a war-ravaged world, and attempt to ensure

that the war's devastation would not be repeated. Since then, the IOIA has been consistently and rightly interpreted to recognize international organizations' absolute immunity from suit in United States courts, subject only to the exceptions provided in their own governing treaties or other instruments, or determined by the President to be appropriate to their particular circumstances. Congress designed this immunity to provide international organizations with protection necessary to enable them to successfully and efficiently fulfill their missions of public interest with full independence. The petitioners' position that, more than seven decades after its enactment, this longstanding recognition of absolute immunity should be limited by application of the statutory exceptions to foreign state sovereign immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C § 1601 *et seq.*, including the "commercial activity" exception of § 1605(a)(2), Pet'r's Br. at 2, 14-16, would dramatically alter the settled expectations of international organizations like *amici* and drastically interfere with their continued ability to carry out their missions, by requiring them to defend themselves against claims in United States courts.

Applying FSIA concepts to international organizations would also be radically at odds with their essential character. International organizations are *not* states, nor are they mere aggregations of states. Nor do they exercise sovereign powers like states. International organizations are separate and independent bodies created by multiple states to address regional or

global issues and provide a forum for cross-border collaboration amongst member states as well as non-member states or private actors. International organizations function as part of a collaborative, diplomatic effort among states that have created and empowered the organization to pursue a specific mission.

Because of their different character, the rationale for conferring absolute immunity on international organizations is fundamentally different than the reasoning behind immunity for foreign states. Although immunity was extended to foreign states as "a matter of grace and comity," *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983)), international organizations required immunity to ensure independence from their member states and the ability to effectively carry out their missions. Altering the immunities enjoyed by international organizations would upend the agreements struck by their members about what protections these international organizations receive in each member state in order to fulfill their purposes. Petitioners' interpretation of the IOIA would run counter to the United States' obligations under its treaties and other international agreements, and in some instances violate those obligations, contrary to the long-established principle that acts of Congress should be construed so as to avoid such violations.

In addition, to import FSIA exceptions to immunity into the IOIA would frustrate the ability of international organizations to carry out their

good work by opening the door to private litigation that would interfere with the discharge of their missions. Organizations would need to divert their limited resources from the financing of these good works to cover the considerable financial and administrative burdens associated with defending themselves from civil litigation in the United States, which would ultimately be collectively borne by member states, including the United States. Such concerns are true not for only the respondent International Finance Corporation ("IFC") and other similar international financial organizations, but for *all* international organizations, including *amici*, since claims would no longer be dismissed by United States courts on grounds of immunity but go forward into resource-intensive litigation.

The Court of Appeals decision avoids these detrimental consequences. It accords with United States jurisprudence, international law, and historical practice and expectations, and facilitates the vital work of international organizations around the world. It should be affirmed.

ARGUMENT

I. THE FOUNDING OF INTERNATIONAL ORGANIZATIONS WAS PREDICATED ON AN UNDERSTANDING OF UNIFORM ABSOLUTE IMMUNITY ACROSS MEMBER STATES

A. The immunities afforded to international organizations reflect agreements by the global community

International organizations are not like states. International organizations have no territory, and they do not have general competence. "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, at 180 (Apr. 11). The specific terms of the constituent documents of international organizations vary, but their common, essential characteristic is that they are products of multilateral international agreement among states.

The absolute immunity of international organizations from suit or other legal process in the member states in which they operate has been a basic principle of international organizations since their creation in the aftermath of World War II.

The concept of international organizations grew out of an understanding among states in the international system that certain issues could not be addressed unilaterally, but required international cooperation. *See, e.g.*, 141 Cong. Rec. H7630-31 (daily ed. July 25, 1995) (statement of Rep. LaTourette) ("[I]f there is a problem in the Great Lakes in Canada, it becomes the problem of the Great Lakes in the United States. It was just such a crossing-all-borders problem that actually spurred the formation of [*amicus*] the Great Lakes Fishery Commission."); Organization of African Unity, Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government, Sept. 9, 1999 ("[T]o rekindle the aspirations of our peoples for stronger unity, solidarity and cohesion in a larger community of peoples transcending cultural, ideological, ethnic, and national differences. . . . [and] effectively address the new social, political, and economic realities in Africa and in the world . . . ."); *Mendaro v. World Bank*, 717 F.2d 610, 619 (D.C. Cir. 1983) ("activities of international organizations are designed to resolve problems spanning national boundaries, with a benefit to be reaped collectively by the organizations' member nations. [They] thus owe their primary allegiance to the principles and policies established by their organic documents, and not to the evolving legislation of any one member."). International organizations act not only across borders, but often in areas and on issues where private actors have not acted and would not act because to do so would be unprofitable or too risky, or even prohibited. *See, e.g.*, *Bisson v. United Nations*, No. 06 Civ.

6352(PAC)(AJP), 2007 WL 2154181, at *3-8 (S.D.N.Y. July 27, 2007) (upholding immunity under IOIA for claims against the United Nations and World Food Programme for injuries suffered by World Food Programme employee in a bombing at United Nations headquarters in Iraq).

To fulfill their purposes, international organizations from the outset required a legal status sufficient to protect their independence, including from their own founding members. *See* Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828, 847 (1947) ("Complete independence from the local authority . . . in order to enable [international organizations] to fulfill [their] international functions, constitutes the *raison d'etre*."). Because international organizations can only act within the territories of states, "[t]he only adequate method [to protect international organizations was] to grant [their] immunities in the basic international treaty, creating *identical and binding international obligations upon all Member States*." *Id.* at 848 (emphasis added). This independence includes immunity from suit in member states' courts. *See* Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 332 (1946) (purpose of the IOIA was to recognize "a legal status which is adequate to ensure the effective performance of [international organizations'] functions and the fulfillment of their purposes."). Immunity from legal process prevented a situation in which domestic courts could be used as proxies through which states could exert influence on an organization's activities, outside of the collective

governance mechanisms that were agreed to by all member states when establishing these organizations.

International organizations are, by definition, "creatures of treaty." *Broadbent v. Org. of Am. States*, 481 F. Supp. 907, 908 (D.D.C. 1978). And it is "by virtue of treaty [that international organizations] stand in a different position with respect to the issue of immunity than sovereign nations." *Id.* Whereas state immunity traditionally has been a matter of comity, the immunity of international organizations is a matter of multilateral international agreement. Many international organizations' governing documents—executed by the founding members, oftentimes including the United States—therefore set forth the scope of the privileges and immunities afforded to those organizations. In certain instances these privileges and immunities mirror the IOIA, while in other instances they include additional immunities or make explicit waiver of immunities to certain suits. These governing documents, and the scope of immunities they contain, represent a negotiated diplomatic and legally binding agreement between member states to abide by and respect the enumerated immunities. *See, e.g.*, Convention on the Privileges and Immunities of the United Nations art. 2(2), Feb. 13, 1946 ("The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of judicial legal process except insofar as in any particular case it has expressly waived its immunity.").

Whereas evolving practice in state immunity produced, over many decades, an accepted distinction between acts *jure imperii* and acts *jure gestionis*, there is no international acceptance of that distinction in the immunity of international organizations. Indeed, there could be no such distinction in the case of international organizations, which are not sovereigns.

B. The IOIA should not be construed to violate the commitments made by the United States

Because international organizations' founding and governing documents constitute treaties or other international agreements among the member states, specific provisions providing for the organization's immunity from suit and other legal process are binding commitments of the member states that must be performed in good faith, in accordance with the ordinary meaning of their terms and in light of their object and purpose. Vienna Convention on the Law of Treaties art. 26, 31(1), May 23, 1969, 1155 U.N.T.S. 331; U.S. Department of State, *Vienna Convention on the Law of Treaties*, https://www.state.gov/s/l/treaty/faqs/70139.htm. A member state cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty. Vienna Convention on the Law of Treaties art. 27. *See* Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at ¶ 62 (Feb. 4) ("[A] state cannot adduce as against another State its Constitution

with a view to evading obligations incumbent upon it under international law or treaties in force."); *see also* Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, at ¶ 139 (March 31) ("The rights granted under the Vienna Convention are treaty rights which the United States has undertaken to comply with . . ."); LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27).

Even where an international organization's founding agreement does not provide for specific immunities, or where the United States has not consented as a party to a particular treaty enumerating these immunities, international organizations' immunities have been considered to constitute customary international law. *See Mendaro*, 717 F.2d at 615 ("One of the most important protections granted to international organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship. Courts of several nationalities have traditionally recognized this immunity, and it is now an accepted doctrine of customary international law.").

Petitioners' position of incorporating the FSIA immunity exceptions into the text of the IOIA threatens to cast aside, in some cases, these international agreements and the obligations imposed on the member states, including the United States, as well as the relevant Executive Orders under the IOIA by which the United States has implemented those obligations. Such an interpretation of the IOIA should be avoided. *See*

Chew Heong v. United States, 112 U.S. 536, 549 (1884) ("[A]ny interpretation of [the act's] provisions would be rejected which imputes to congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty."); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). By contrast, recognizing international organizations' absolute immunities as contemplated at the time when the IOIA was enacted harmonizes it with the treaties and agreements creating these organizations. That the United States agreed to provide absolute immunity in the founding treaties and agreements of certain international organizations created well after the FSIA entered into force demonstrates that the FSIA was not intended, and should not be interpreted, to limit the immunities of international organizations.

C. The IOIA's absolute immunity complements these treaty-based immunities

The IOIA's longstanding rule of absolute immunity applies as the critical default standard in the United States, where the international organization's founding agreement does not provide for specific immunities, or where the United States has not consented as a party to a particular treaty enumerating these immunities. Thus, in situations where the IOIA is the sole provision of immunities

for international organizations in the United States, it grants "virtually absolute immunity,"[3] which can only be limited by executive order or express waiver of this immunity by the international organization itself. *See Atkinson*, 156 F.3d at 1341.

For example, the WIPO Convention provides that the organization enjoys the immunities provided to the extent further agreed upon by the member state:

> The Organization may conclude bilateral or multilateral agreements with the other Member States with a view to the enjoyment by the Organization, its officials, and representatives of all Member States, of such privileges and immunities as may be necessary for the fulfilment of its objectives and for the exercise of its functions.

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[3] "[V]irtually absolute immunity" refers to the immunity that foreign sovereigns enjoyed at the time of the IOIA's enactment, which was only limited by waiver by the sovereign. *Samantar*, 560 U.S. at 311 (citing *Verlinden*, 461 U.S. at 486). Similarly, the IOIA's virtually absolute immunity confers absolute immunity from suit, subject only to waiver in the international organization's governing documents or international agreement, or where the President has explicitly limited immunity. *See Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1337, 1340 (D.C. Cir. 1998) (finding that the Inter-American Development Bank was entitled to "virtually absolute immunity" under the IOIA, limited only by situations in which international organizations waived their immunities or the President conditioned, limited, or revoked any such immunities); *see also* Resp't's Br. at 18-19.

Convention Establishing the World Intellectual Property Organization art. 12(3), July 14, 1967, 21 U.S.T. 1749.[4] In this respect, a Headquarters Agreement was concluded between WIPO and the Swiss Federal Council in 1970, which provides in particular that WIPO enjoys immunity "from criminal, civil and administrative jurisdiction, save in so far as such immunity has been formally waived by the Director General of the Organization." WIPO Swiss Headquarters Agreement art. 5(1).

But because the United States is not a signatory to the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, Annex XV of which provides additional enumerated immunities for WIPO, the scope of WIPO's immunities in the United States depend upon the extent immunities are conferred by the IOIA. *See* U.N. Treaty Collection, *Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc.*, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iii-2&chapter=3&lang=en#2. *See also* Convention on the Great Lakes Fisheries between the United States of America and Canada, Sept. 10, 1954 (containing no provisions on

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[4] This provision encouraged additional agreements with member states to reflect the absolute immunity granted WIPO in the headquarters agreement concluded with its host state of Switzerland. *See* Agreement between the Swiss Federal Council and the World Intellectual Property Organization to determine the legal status in Switzerland of the Organization (hereinafter "WIPO Swiss Headquarters Agreement") art. 5(1), Dec. 9, 1970.

privileges and immunities); Agreement establishing the International Fund for Agricultural Development art. 2(a), June 13, 1976, 28 U.S.T. 8435 ("The Fund shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the exercise of its functions and for the fulfilment of its objective."); General Convention on the Privileges and Immunities of the Organization of African Unity (hereinafter "African Union Immunities Convention"), Oct. 25, 1965 (the United States is not a signatory to the Convention, but has designated the African Union as an international organization under the IOIA). The IOIA therefore serves as the backstop basis for international organization immunity in the absence of a governing treaty or international agreement (or where the relevant treaty is not self-executing), and the organizations that depend solely on the IOIA to define their immunities under U.S. law have relied in good faith on the absolute immunity recognized thereunder since their creation.

D. International organizations have relied on and consistently asserted their virtually absolute immunity under the IOIA

Since the IOIA was enacted in 1945, international organizations and courts in the United States have considered their immunity in the United States and abroad to be virtually absolute, subject only to consent to jurisdiction by express waiver in the international organizations' governing documents themselves, or explicit modifications by the Executive Branch. *See* 22

U.S.C. § 288a(b); *Atkinson*, 156 F.3d at 1339 ("The IOIA speaks in terms of 'immunity from suit and *every form of judicial process*,' language which admits of no exception . . . .") (citation omitted); *Price v. Unisea, Inc.*, 289 P.3d 914, 920 (Alaska 2012) ("Almost every court . . . has agreed that international organizations retain the absolute immunity granted when the IOIA was enacted in 1945.") (citing cases). Neither international organizations nor courts in the United States (with the exception of the Third Circuit) have understood an international organization's immunity to be subject to any type of commercial activity exception. *See, e.g., Inversora Murten, S.A.*, 264 F. App'x 13, at *2 (D.C. Cir. 2008) ("Because the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the Foreign Sovereign Immunities Act of 1976 ('FSIA').").

Indeed, when sued in United States courts, international organizations have asserted—and the courts have agreed—that absolute immunity is essential to carrying out their missions around the world. *See Mendaro*, 717 F.2d at 615 (immunity of World Bank upheld because immunities are critical "to the growing efforts to achieve coordinated international action through multinational organizations with specific missions"); *Int'l Refugee Org. v. Rep. S.S. Corp.*, 189 F.2d 858, 861 (4th Cir. 1951) (advocating a liberal interpretation of the IOIA because "[t]he broad purpose of the [IOIA] was to vitalize the status of international organizations of which the United States is a

member and to facilitate their activities.") (quoting *Balfour, Guthrie & Co. v. United States*, 90 F. Supp. 831, 833 (N.D. Cal. 1950)). *See also, e.g.*, WHO Constitution art. 67(a) ("The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions."); African Union Immunities Convention ("CONSIDERING it necessary that the representatives of the Members of the Organization of African Unity and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions . . . ."). It would be radically inconsistent with the IOIA's history and purpose to change the absolute immunity of international organizations, and be radically at odds with the legitimate expectations of such organizations, which depend on the IOIA's protections where their governing documents do not themselves address their immunities or the immunities therein are not otherwise given effect in U.S. law.

E. Exposing international organizations to suit through the commercial activity exception now would upend the international regime of immunity

Petitioners' interpretation of the scope of immunity in the IOIA also threatens to fragment the international regime predicated on international organizations being immune from suit in every state in which they operate. It would be counterintuitive for this Court to unilaterally

determine, given the history of cooperation and reliance among international organizations and their constituent member states, that the previously-negotiated and collectively-understood immunities in international organizations' governing documents and the IOIA should now be transformed into an evolving standard, dependent not on multilateral founding documents achieved by consensus, but on the immunity exceptions of the FSIA as interpreted by U.S. courts. *See Atkinson*, 156 F.3d at 1341 (legislative history of IOIA suggests "that responsibility for modifying immunity granted by the IOIA rests with the President rather than with an evolving separate body of law"). Moreover, the FSIA represents but one country's approach to the distinction in state immunity between acts *jure imperii* and acts *jure gestionis*, and there are many other approaches in the world.[5]

Such fragmentation in the interpretation of the immunities in these governing documents and the IOIA would undermine the United States' interest as a member and beneficiary of much of the humanitarian and other public interest work of these international organizations, and effectively

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[5] Whereas the FSIA focuses on the nature of the acts, courts in some countries continue to refer to the purpose of the acts in making determinations about state immunity, and Article 2.2 of the United Nations Convention on the Jurisdictional Immunities of States and Their Property allows consideration of the purpose if that is the practice in the state of the forum. David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 199 (2005).

violate the United States' commitments to other nations and the international community as a whole. Petitioners' position, if accepted, could therefore create a perverse rationale for international organizations to restructure their operations to severely reduce their contact with the United States in order to avoid the increased risk of being potentially subject to suit in this country.

For the courts of one member state to unilaterally redefine the immunities accepted and relied upon by all parties after years in which no question was raised about those immunities would threaten the careful diplomatic balance struck when international organizations were founded and empowered to conduct their humanitarian and other public interest efforts around the world. Member states rely on the immunities enumerated in the governing documents they agreed to when founding these international organizations and on the historical backdrop of the IOIA providing absolute immunity to international organizations in the United States legal system. It would be profoundly disruptive for one country, the United States, to change the rules of the game by exercising judicial jurisdiction contrary to what was agreed in the international organization's governing documents or generally understood to be permitted by the IOIA. This is particularly true for the United States, which has "assumed [the role] as 'host' to an ever-growing number of international organizations." Preuss, *The International Organizations Immunities Act* at 338.

If the United States were to deny the regime of absolute immunity historically afforded to international organizations under the IOIA and international consensus, it would not only violate its commitments under international agreements, but would place itself at odds with other member states that acknowledge international organizations' absolute immunities. *See Broadbent*, 481 F. Supp. at 908 ("The United States has accepted without qualification the principle that international organizations must be free to perform their functions and that no member state may take action to hinder the organization."); *see also, e.g.*, *World Bank Grp. v. Wallace*, 2016 SCC 16 ¶ 93 (Can.) ("It is part of the original agreement that in exchange for admission to the international organization, every member state agrees to accept the concept of collective governance. As a result, no single member can attempt to control the institution . . . "). For example, United Nations specialized agencies, including *amici* FAO, IFAD, UNIDO, WHO, and WIPO, have been granted immunity from every form of legal process absent a waiver of immunity by the Convention on the Privileges and Immunities of the Specialized Agencies, which is recognized by the 129 states who are parties to the Convention. *See* U.N. Treaty Collection, *Convention on the Privileges and Immunities of the Specialized Agencies*, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iii-2&chapter=3&lang=en. A decision by this Court that unilaterally redefines the scope of these immunities in the United States would be contrary to the widespread acceptance of these organizations' absolute immunity by other

United Nations member states. This could also encourage a race to United States courts, which would be flooded with plaintiffs attempting to use these courts as the only permissible forum for claims that could not otherwise be brought against specialized agencies in other jurisdictions.

II. APPLICATION OF A COMMERCIAL ACTIVITY EXCEPTION TO INTERNATIONAL ORGANIZATIONS' IMMUNITY FRUSTRATES INTERNATIONAL ORGANIZATIONS' ABILITY TO FULFILL THEIR PURPOSES AND THEIR MEMBER STATES' INTERESTS

Despite this weighty history and longstanding legal doctrine and the reliance of international organizations on the protection it supports, petitioners urge the Court to read the IOIA to subject international organizations to the jurisdiction of the United States courts if they engage in commercial activities, which the FSIA measures by the "nature" and not the "purpose" of such activities. 28 U.S.C. §§ 1603(d), 1605(a)(2). *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). While *amici* do not consider that any of their activities are "commercial activities" within the meaning of the FSIA, the very threat that this claim could be made could cause expense and disruption to them because of potential litigation.

Because the FSIA's distinction between sovereign and commercial acts is wholly

inapplicable to international organizations, this standard could throw into confusion the immune status of a multitude of activities that international organizations do or could engage in and without which they could not function to fulfill their basic missions. *See Azima v. RAK Inv. Auth.*, 305 F. Supp. 3d 149, 161 (D.D.C. 2018), *appeal pending* ("For example, courts have held that retaining an attorney, contracting to buy goods or services, or repudiating a contract for goods and services all qualify as 'commercial activities' under the FSIA.") (citing cases). This would create a risk that United States courts would accept jurisdiction over claims brought against international organizations.

Indeed, because the FSIA definition of "commercial activity" does not turn on the "purpose" of the activity or exclude non-profit activities from its purview, *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781, 794 (S.D.N.Y. 2008) (contract to purchase yarn was a commercial activity even though the transaction was part of the United Nations Oil for Food Program), even humanitarian and other public interest work conducted in or having a direct effect in the United States could subject international organizations to the jurisdiction of United States courts. Regardless of their *pro bono publico* purpose, much of what international organizations do could become a basis for creative plaintiffs to seek to use United States courts as a forum to prevent or influence the operations and decisions of these organizations, separate from and in competition with the governing organs of these multilateral organizations.

Because of this broad interpretation of "commercial activity," petitioners' reading, if adopted, would all but ensure serious threats of litigation that would, in itself, undermine the activities and missions of these organizations. International organizations would have to dedicate significant resources to defending themselves against suit, including against suits aimed at influencing how international organizations fulfill their purposes. International organizations could be either directly prevented from carrying out their mandates, or have their independence and impartiality jeopardized.

An international organization's immunities protect the assets of the organization from being used for any reason and by any means other than what was specifically and collectively authorized by its member states in the treaty or international agreement that created it. A judicial decision to the contrary would violate a fundamental protection that enables the organization to conduct its international responsibilities, as provided in the treaty or agreement that created it.

A. Application of the FSIA commercial activity exception would frustrate international organizations' ability to fulfill their missions

1. *Importing the commercial activity exception from the FSIA would divert valuable resources*

Allowing international organizations to be sued in United States courts by invoking the FSIA's commercial activity exception would impose considerable burdens on the organizations and redirect their attention and finite resources to defend against an increasing number of suits and asset their immunities. Absolute immunity means that international organizations historically have been free from the burdens of *both* "the consequences of litigation's results [*and*] also the burden of defending" themselves in court. *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014) (citation omitted).

Until now, courts have routinely recognized the immunities of international organizations to a variety of claims. *See, e.g.*, *Donald v. Orfila*, 788 F.2d 36 (D.C. Cir. 1986) (upholding immunity of OAS in wrongful termination claim brought by former employee); *Sadikoglu v. U.N. Dev. Programme*, No. 11 Civ. 0294(PKC), 2011 WL 4953994 (S.D.N.Y. Oct. 14, 2011) (upholding immunity of the United Nations Development Program in a contract dispute with third party vendor or contractor); *Inversora Murten, S.A. v.*

Energoprojekt-Niskogradnja Co., 264 F. App'x 13 (D.C. Cir. 2008) (upholding immunity of the World Bank from a writ of attachment against its assets in the United States); *Nyambal*, 772 F.3d at 277 (upholding immunity of the IMF against an order for jurisdictional discovery); *United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063 (S.D.N.Y. Feb. 26, 2007) (upholding immunity of the United Nations against a motion to compel the production of documents). Under the FSIA exception, instead of being dismissed at the outset on immunity grounds, such suits, even if ultimately found meritless, would go forward into time-consuming and expensive discovery. One only has to compare the small number of cases involving the IOIA since its enactment in 1945 to the exponentially larger number of cases involving the FSIA since 1976 to appreciate the significant financial burden and diversion of management's focus that restricting international organizations' immunity would have.[6] Applying FSIA analysis to Section 288a(b) also leads to a procedural conundrum under the IOIA because Section 288a(c) separately guarantees that international organizations are immune from most forms of discovery ("The archives of international

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[6] Indeed, one search by counsel for state and federal cases referencing the IOIA identified only approximately 200 relevant cases. In contrast, a search by counsel for state and federal cases referencing the FSIA identified nearly 4,000 cases.

organizations shall be inviolable."). 22 U.S.C. § 288a(c). [7]

The possibility of suit under the laws of each of the fifty states of the United States, and the different laws of every one of the countries in which an international organization operates, would only add to the burdens. In the employment context for example, international organizations would have to contend with "the sheer difficulty of administering multiple employment practices in each area in which an organization operates [which] suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." *Mendaro*, 717 F.2d at 615-16.

2. *The application of the commercial activity exception to international organizations' immunities would undermine their missions*

"[T]he very structure of an international organization . . . requires that the organization remain independent from the intranational policies of its individual members," *Mendaro*, 717 F.2d at 616, as well as from the influences of interested private parties. Subjecting international organizations to jurisdiction based on their alleged

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[7] Petitioners' argument fails to take into account the serious uncertainties international organizations would face regarding how and when the FSIA and its exceptions would apply. Resp't's Br. at 40-43.

commercial activities would allow private parties to use the United States judicial system to try to dictate international organizations' priorities and the way they conduct their activities. Petitioners here are not the first who have sought to control how international organizations can act and whether they can act at all. *See, e.g.*, *Atl. Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F.Supp.2d 126, 132 (D.D.C. 2003) (unsuccessful suit for temporary restraining order and injunction against loan intended to finance telecommunications system that would compete with plaintiff's system); *Bro Tech Corp. v. European Bank for Reconstruction and Dev.*, No. CIV.A. 00–2160, 2000 WL 1751094 (E.D. Pa. Nov. 29, 2000) (dismissing suit arising out of European Bank for Reconstruction and Development's refusal to re-finance plaintiff's loans because international organization's absolute immunity was only subject to limited waiver).

This potential threat to international organizations' independence and the need to ensure equal treatment by member states is precisely why international organizations enjoy absolute immunity in the first place. *See, e.g.*, *Mendaro*, 717 F.2d at 615 ("the purpose of immunity . . . is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory."); *Lutcher S.A. Celulose E Papel Condoi, Parana, Brazil v. Inter-Am. Dev. Bank*, 253 F. Supp. 568, 570 (D.D.C. 1966) ("cases involving the discretion and judgment of the Bank's governing board in matters of economic policy

closely associated with consideration of international politics are vastly different from cases involving simple torts and contracts. Where delicate, complex issues of international economic policy are involved, jurisdiction should be denied."); *cf. Samantar*, 560 U.S. at 311 (at common law, foreign sovereign immunity was "a matter of grace and comity") (quoting *Verlinden*, 461 U.S. at 486).

The dangers of eliminating international organizations' immunity from suit go far beyond impeding the vital work of multilateral development banks or international finance institutions like respondent IFC. Because the FSIA's commercial activity exception has been interpreted broadly by United States courts to encompass activities that can be done by a private actor in or having a direct effect in the United States, all international organizations with connection to the United States could potentially be sued by plaintiffs seeking to influence the way they carry out their missions. The risk of such suits would itself have a chilling effect on the functioning of international organizations.

B. Application of the commercial activity exception from the FSIA would impose a considerable burden on member states

Exposing international organizations to suit in the United States would also impose a considerable financial burden on their member states. International organizations are financed, either in whole or in part, by their member states,

with their budgets dedicated to the fulfillment of their missions. *See, e.g.*, Great Lakes Fishery Commission, *Budget*, http://www.glfc.org/budget.php (noting that the GLFC is funded by the United States and Canada, with the United States contributing 69 percent of its budget). Any expenses resulting from litigation would constitute extra-budgetary expenses to be collectively borne by the member states, including, where applicable, the United States. These international organizations would therefore need to increase their funding from member states to accommodate the anticipated costs of defending themselves from litigation.

III. INTERNATIONAL ORGANIZATIONS ALREADY HAVE GOVERNANCE AND REGULATION MECHANISMS

Finally, any suggestion that litigation in U.S. courts by private adversaries is an appropriate or necessary mechanism for regulating the behavior of international organizations, and that their immunities should therefore be restricted to permit such litigation, is radically unsound. *First*, the IOIA already contains an "explicit mechanism for monitoring the immunities of designated international organizations." *Atkinson*, 156 F.3d at 1341. *See also In re Dinastia, L.P.*, 381 B.R. 512, 520 (S.D. Tex. 2007) (quoting *Mendaro*, 717 F.2d at 613-14).

Second, international organizations have robust mechanisms of oversight, and are subject to international and collective regulation by various

decision-making bodies comprised of representatives from member states and elected officers. For example, the OECD has a governing structure headed by a Council formed of representatives of member countries tasked with oversight and strategic direction decisions made on a consensus basis. *See* OECD, *Who does what*, http://www.oecd.org/about/whodoeswhat/. In demonstrating their commitment to carry out their missions in an ethical and accountable manner, international organizations additionally provide for oversight and auditing mechanisms and engage in transparent self-reporting. *See, e.g.*, UNIDO Indus. Dev. Org., Rep. on the Work of Its Forty-Fourth Session, GC.17/2 (2016) (establishing the Independent Audit Advisory Committee of UNIDO).

Third, many international organizations have put in place their own mechanisms to resolve disputes. For example, the International Labour Organization Administrative Tribunal hears complaints brought by current and former employees of various international organizations, including certain *amici*. *See* International Labour Organization, *Membership*, https://www.ilo.org/tribunal/membership/lang--en/index.htm. Other international organizations have similar mechanisms for dealing with disputes without consenting to jurisdiction of national courts.

CONCLUSION

For the reasons set forth above, the Court should affirm the Court of Appeals decision below.

Respectfully submitted,

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